LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 23 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 737

NORTHERN VIRGINIA SUN PUBLISHING COMPANY, a co-partnership composed of George W. Ball, Philip M. Stern, Arnold Sagalyn and Clayton Fritchey, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, and ROGER W. WHEELER, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT, ROGER W. WHEELER, ET AL., IN OPPOSITION.

SEYMOUR J. SPELMAN
823 South Washington Street
Alexandria, Virginia
Counsel for Respondent Roger W. Wheeler, et al.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Argument	4
1. The decision below is clearly correct and there is no conflict among the circuits	5
2. The problem posed by petitioners does not have sufficient importance to warrant review since a complete remedy for the alleged evils is afforded by the statute	7
3. Petitioners have failed to exhaust that statutory remedy and the judgment of the court below is therefore not a final order subject to review	9
Conclusion	9

CITATIONS

Cases:

Brewery Workers v. National Labor Relations Board (Gulf Bottlers, Inc.), 47 LRRM 2688, October 3, 1960	8
Local 833, United Automobile Workers v. National Labor Relations Board (Kohler Co.), 47 LRRM 2600, November 29, 1960, certiorari denied, 365 U.S. 869	8
Local 2674, Carpenters v. National Labor Relations Board (Belcher Box Refrigerator Door Co.), 47 LRRM 2688, September 16, 1960	8

Statutes:

28 U.S.C. Sec. 2112(a)	2, 3, 4, 5, 6, 8, 9
29 U.S.C. Sec. 160(e) and (f)	2, 5, 7
28 U.S.C. Sec. 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 737

NORFOLK VIRGINIA SUN PUBLISHING COMPANY, a co-partnership composed of George W. Ball, Philip M. Stern, Arnold Sagalyn and Clayton Fritchey, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, and ROGER W. WHEELER, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT ROGER W. WHEELER, ET AL., IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is not yet reported but is printed in the Appendix to the Petition herein at pages 20a through 31a. The Decision and Order of the National Labor Relations Board is reported at 130 NLRB No. 109.

JURISDICTION

The order of the Court of Appeals denying the writ of mandamus was entered on January 30, 1962, and is printed in the Appendix to the Petition on pages 32a and 52b. The petition for a writ of certiorari was filed on February 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Where a petition for review of a National Labor Relations Board order is filed in the District of Columbia Circuit at 10:50 a.m. on December 7, 1961, by aggrieved employees, and a second petition for review of the same order is filed later that same day in the Fourth Circuit by the aggrieved employer, in which circuit was the proceeding "first instituted" within the meaning of Title 28 U.S.C. Sec. 2112(a)?

STATUTES INVOLVED

The statutes involved are:

(1) Section 2112 of the Judicial Code, Act of August 28, 1958, 72 Stat. 941, 28 U.S.C. Section 2112.

(2) Sections 10 (e) and (f) of the National Labor Relations Act, as last amended September 14, 1959, 73 Stat. 544, 29 U.S.C. Section 160 (e) and (f).

They are set forth verbatim at pp. 34a-37a of petitioners' appendix.

STATEMENT

On December 7, 1961, at 10 a.m. the Board issued and distributed to the parties its Decision and Order in which it found petitioners guilty of certain unfair labor practices and dismissed the complaint as to cer-

tain others.[1] At 10:50 a.m. the same day, present intervenors (the 28 employees aggrieved by the Decision and Order) filed a petition for review of the Board's Decision and Order in the District of Columbia Circuit. Later that same day, petitioners (the employer-respondents in the Board proceeding) filed their petition for review in the Fourth Circuit.

Title 28 U.S.C., Sec. 2112(a) requires that "If proceedings have been instituted in two or more courts of appeals with respect to the same order the . . . board . . . shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted." Notwithstanding the acknowledged priority in time of filing by intervenors and the obvious convenience of the D.C. Circuit for *all* parties as reviewing forum, petitioners on December 26, 1961, filed a Petition for Writ of Mandamus in the Fourth

[1] The Board found that petitioners, in March 1959, unlawfully discharged 34 of its employees and caused 10 others to engage in an unfair labor practice strike. However, it narrowly restricted the back pay remedy as to those discriminatees and dismissed the complaint as to four of the discharged employees and as to certain other alleged illegal actions.

[2] But it may be noted that in the present case there is not a single circumstance which could justify the transfer from the D.C. Circuit to this Court. All of the parties and all of the attorneys live in the District of Columbia or in the Metropolitan Washington area. The petitioner's plant is located in the Metropolitan Washington area, and the newspaper it publishes is circulated there. And the union which represents all the employees involved in the proceeding has its office in the District of Columbia. Literally, there is not a single person involved in this cause who lives within 100 miles of this Court; everyone involved is within a short ride to the D.C. Circuit Court Building. Opposition of Intervenors to Petition for Writ of Mandamus, Petitioners' Appendix, pp. 17a and 18a.

Circuit seeking to compel the Board to file the record there rather than in the District of Columbia Circuit.

On January 30, 1962, the Fourth Circuit (Sobeloff, C. J. speaking for a unanimous court) denied the petition on the ground that the District of Columbia Circuit was clearly the court in which the proceeding was "first instituted" and that no relief through extraordinary writ from the Fourth Circuit was appropriate since petitioners had an adequate statutory remedy in the D. C. Circuit by motion to "transfer all the proceedings to any other court of appeals . . . for the convenience of the parties in the interest of justice." Title 28 U.S.C. Sec. 2112(a)

Petitioners filed no such motion. Instead, on February 21, 1962, they brought the present petition to this Court seeking a reversal of the Fourth Circuit's refusal to order the record to be filed in that court.

On February 21st, the D. C. Circuit (Fahy, Danaher and Bastian) unanimously rejected a motion to postpone the filing of the record in that court pending a ruling on the present Petition for Certiorari. And on February 22nd, the Fourth Circuit denied petitioner's motion to stay its judgment during the pendency of the present petition.

ARGUMENT

Petitioners' argument rationalizing their forum-shopping presents no issue warranting review by this Court. They pose a problem in statutory construction where none exists and then seek to imbue it with an urgency it does not have. In rejecting their argument the Fourth Circuit was plainly correct, as underscored by the refusals to stay the proceedings during the

pendency of this petition. There is no conflict among the circuits on the "issue" and petitioners claim none. Moreover, since petitioners have the right under the statute to move for transfer to the Fourth Circuit on the all-sufficient grounds of convenience and justice, the initial refusal of the Fourth Circuit to assert jurisdiction lacks the finality essential to review.

1. The statutes governing review of Board orders on petition by aggrieved parties are clear and simple, both in language and purpose, and the logic of the Fourth Circuit in construing them in the present context is irresistible.

Title 29 U.S.C., Section 160(f), provides that "Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . , or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition . . ."

Title 28 U.S.C., Section 2112(a), provides: "If proceedings have been instituted in two or more courts of appeals with respect to the same order the . . . board . . . shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted."

Upon the filing of the record, the jurisdiction of that court is exclusive (29 U.S.C., Sec. 160(e) and (f)), and "The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed". 28 U.S.C. 2112(a).

In view of the undisputed priority in time of filing of intervenors' petition and the plain meaning of the relevant statutes, the Fourth Circuit held that intervenors' petition in the D. C. Circuit was the "first instituted" and rejected petitioners' effort to restrain the Board from filing the record in that circuit. Pursuant to 28 U.S.C. §2112(a), the Court then directed its clerk to transfer petitioners' papers to the D. C. Circuit "in order that it may exercise jurisdiction in the case". (Appendix to Petition, p. 37a.) It would not seem that any serious question could be raised as to the correctness of that ruling.

Petitioners argue, however, that their petition, though second in time, should nevertheless be treated as first. To reach this result they contrive a construction of the words "first instituted" by reading into the statutory scheme a Congressional preference for having petitions for review of Labor Board orders heard in the circuit where the unfair labor practices occurred (here, the Fourth Circuit) rather than in the D. C. Circuit. To effectuate that claimed preference in the present circumstances, they ask this court to ignore priority in time of filing within the same day, treat the two petitions as having been simultaneously filed and resolve the resultant jurisdictional deadlock in favor of the Fourth Circuit.

Under this reasoning, intervenors' petition would move from its acknowledged first position to a tie with petitioners', and thus to second place by application of the tie-breaking preference for the circuit where the unfair practices occurred. By this alchemy of construction, their second-place petition becomes transmuted to that of "first instituted."

But the provision governing petitions for review by aggrieved parties discloses no Congressional prefer-

ence for one circuit over another. [29 U.S.C. 160(e).] To the contrary, in the case of multiple petitions filed in different circuits, Congress explicitly resolved the jurisdictional conflict in terms of time ("first instituted"), not place; and on subsequent motions for transfer, it expressed its preference, not on the basis of where the unfair practices occurred, but on the basis of "convenience of the parties in the interest of justice."

It is true that the statute does not permit the Board itself to initiate enforcement proceedings in the D. C. Circuit [29 U.S.C. 160(e)], but the policy underlying that limitation on Board action cannot be indiscriminately imported into the separate provision governing petitions for review instituted by aggrieved parties. As Judge Sobeloff points out: ". . . this section is constructed differently . . . for it expressly permits an aggrieved party to seek review in the District of Columbia Circuit even if the unfair labor practice occurred elsewhere . . . By not eliminating, but expressly acknowledging, the District of Columbia as an alternative forum, the apparent aim of Congress is to ease the situation of a losing party desiring review. It affords him a choice denied the Board when it proceeds under section 10(e)."

2. Petitioners seek to impart an urgency to the question with the extravagant assertion that the time-clock rule for determining priority of filing "guarantees" that all petitions for review will be heard in the District of Columbia, to the exclusion of other circuits. (Petition, p. 7.) The short answer is that it has not worked out that way after four years of experience under the statute; this Court may properly take judicial notice of the fact that petitions for review are fairly well distributed among all circuits.

Moreover, since the Board's normal practice is to mail its decisions to the parties (Brief For the National Labor Relations Board In Opposition, pp. 7, 8), the contrary argument could be fashioned, in a particular case, that such practice favors the "home" circuit to the exclusion of the District of Columbia. The point is that neither argument is relevant.[2] Although the possibilities of preference and forum non conveniens do exist under the time clock rule, Congress has provided an adequate and simple remedy in Title 28, U.S.C. Sec. 2112(a) which states that where proceedings have been instituted in two or more courts, that court in which the proceeding was "first instituted" has the discretion to "transfer all the proceedings with respect to such order to any other court of appeals . . . for the convenience of the parties in the interest of justice."[3]

This is a sensible and easily administered resolution of any inequities involved in the review procedure to the extent there is such problem[4] for, as Judge Sobe-

[2] The D.C. Circuit is sensitive to the demands of convenience and justice in the proper circumstances, as evidenced by its transfer of the proceedings in *Local 2270, Carpenters v. National Labor Relations Board; Butcher Boy Refrigerator Co.*, 47 LRRM 2088 (Sept. 26, 1960).

[3] As petitioners point out, the questions sought to be presented in this case have not been passed upon and are raised for the first time in this Court. So far as we have been able to determine, the forum non conveniens problem in a Labor Board proceeding has arisen in only three cases: *Local 833, United Automobile Workers v. National Labor Relations Board; Kohler Co.*, 47 LRRM 2600 (Nov. 23, 1960), certiorari denied, 365 U.S. 810; *Brewery Workers v. National Labor Relations Board; Gulf Battlers, Inc.*, 47 LRRM 2688 (Sept. 1, 1960); *Local 2270, Carpenters v. National Labor Relations Board; Butcher Boy Refrigerator Door Co.*, 47 LRRM 2088 (Sept. 26, 1960).

loff notes: "when two parties, each aggrieved, seek review as in the present case, the relative inconveniences would vary from case to case, and understandably Congress saw fit to leave this judgment (as to forum) originally to the Board, and since the passage of section 2112(a) to the courts." (Petition, Appendix, p. 30).

3. This statutory remedy, entirely adequate to redress any potential inequities in the determination of the forum for review, has not been exhausted by petitioners. Any prejudice which petitioners could legitimately claim resulting from review in the District of Columbia as against the Fourth Circuit is within the protective ambit of the statutory words "convenience and justice." The initial refusal of the Fourth Circuit to assert jurisdiction cannot therefore be regarded as a final order for which review by this Court is available. The fact that the question petitioners seek to present here cannot be raised in the same form at a later stage of this case (Petition, p. 7) does not of itself create finality in the appellate sense. Nor, in view of the statutory scheme, can finality be created by the rejection of a frivolous petition for mandamus.

CONCLUSION

For the reasons above set forth, it is respectfully requested that the writ of certiorari be denied.

Respectfully submitted.

SEYMOUR J. SELIGMAN
833 South Washington Street
Alexandria, Virginia
Counsel for Respondent
Roger W. Wheeler, et al.